Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6152

JANICE HAYES, Appellant

v.

VALLEY BANK OF NEVADA,
SCOTTY GLADSTONE, MERVIN IVERSON,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES SCOTTY GLADSTONE AND MERVIN IVERSON'S MOTION TO DISMISS APPEAL

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Appellant in Proper Person

April 5, 1980

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BRIEF OF APPELLANT IN OPPOSITION

TO MOTION TO DISMISS APPEAL

COMES NOW the Appellant in Proper person, JANICE HAYES, and submits this Brief in Opposition to the Motion to Dismiss Appeal filed by Appellees Scotty Gladstone and Mervin Iverson.

The appellant combined two cases, Hayes v. Gladstone and Iverson and Hayes v. Valley Bank of Nevada in one Jurisdictional Statement and the appeals were docketed as the within Case No. 79-6152 on February 28, 1980.

Appellant respectfully requests that this Court consider Case No. 79-6152 with another appeal now before the Court on a Petition for Rehearing, Case No. 79-5777, Janice Hayes v. Board of Trustees of the Clark County School District, which the Court dismissed for want of jurisdiction on February 19, 1980.

All three appeals are from the Supreme Court of Nevada and concern the same issue: the constitutionality of Nevada Rule of Appellate Procedure 46(b), which prohibits appearances before the Nevada Supreme Court in proper person, and whether that Court may dismiss, evade and refuse to consider appeals of right for the sole reason that Appellant is not represented by an attorney.

Appellant has not been able to consolidate these appeals as there is no provision in the Supreme Court Rules for a motion to join an appeal filed later, the case herein, docketed February 28, 1980, with an appeal based on the same question already before the Court, Case No. 79-5777, docketed December 12, 1979.

For the same reason, the real party in interest, the Nevada Supreme Court, is not an Appellee. The caption of Appellee's Motion to Dismiss Appeal incorrectly lists the Justices of the Nevada Supreme Court and the State of Nevada as Appellees. The appellant included them as such in her Jurisdictional Statement, but was advised by the Clerk of this Court that only those who were parties in the Court below may be Appellees in this Court.

The Attorney General, therefore, does not represent the people of the State of Nevada or the Justices of the Nevada Supreme Court in the appeal herein.

The Nevada Supreme Court, not being represented by the Attorney General, is not bound by his statements or interpretations of its Orders, and it will remain free to await the decision of this Honorable Court and then interpret its own Orders accordingly.

Appellant, therefore, respectfully repeats her request that this Court direct the Nevada Supreme Court to definitively state whether its Orders in Case No. 11992, Hayes v. Gladstone, are intended as a dismissal of counts of the Complaints or merely a dismissal of the appeal as not cognizable, and if the former, whether the dismissal is with or without prejudice and for what reason, and that such clarification be made before this Court announces its decision. The Orders referred to are attached to the Jurisdictional Statement in the case herein at pages 7a and 8a.

Appellee's motion merely repeats Appellant's statement that the appeal of Hayes v. Gladstone is precautionary, a fact not in dispute, without addressing any of the points presented in the Jurisdictional Statement.

The combined effort of three attorneys produced only one conclusory contention which is unsupported by the facts.

THE APPEAL FROM THE SUPREME COURT OF NEVADA PRESENTS A SUBSTANTIAL FEDERAL QUESTION WHICH WAS TIMELY RAISED.

The Appellee's own motion disproves the statements therein. On page 1, they assert that "no order of the Court has been entered which would deny Appellant the opportunity to appear before the Supreme Court of the State of Nevada in proper person," and on page 2 that "the Nevada Supreme Court has entered no Order which raises the federal question presented for review, and the Court, therefore, neither addressed nor decided the question of whether Appellant was precluded from appearing before the Nevada Supreme Court pursuant to Nevada Rule of Appellate Procedure, Rule 46(b)."

The issue is not whether the Nevada Supreme Court raised the issue, but whether Appellant did, and the answer is emphatically affirmative.

Appellees quote from the Order entered December 3, 1979, which clearly proves that Appellant raised the federal question, not only once, but several times.

The Order, on page 3 of Appellee's motion, states:

" . . . Appellant's motion for rehearing on our order denying leave to appear in proper person is accordingly rendered moot, and is therefore also denied. . ."

Appellant had also raised the federal question in a motion for a declaratory judgment in Hayes v. Gladstone and Hayes v. Valley Bank as well, which motions were never ruled on.

Upon appeal to this Court, Appellant moved for a stay of remittitur and after the stay was granted, she timely moved for

extensions. On March 11, 1980, after receiving notice of the docketing of this appeal, the Nevada Supreme Court vacated the stays in Hayes v. Gladstone and Hayes v. Valley Bank.

The Order refers to the declaratory judgment, and states that "we decline to consider any further matters in this case." See p. 1a, infra.

The Appellant thus raised the federal question four times in Hayes v. Gladstone in motions and petitions for rehearing, and in addition, she presented the issues many times in Hayes v. Board of Trustees, Case No. 79-5777 in this court, and in Hayes v. Valley Bank, which is included with Hayes v. Gladstone in the appeal herein.

All of these cases were pending at the same time and the motions were made over an eight month period.

If the issue was not decided or expressly passed on, this is not due to any lack of diligence by Appellant, but rather to the efforts of the Nevada Supreme Court to evade consideration of the federal question.

Taken together, the Orders issued in these cases clearly demonstrate a pattern of evasion both as to the constitutionality of NRAP 46(b) and whether or not dismissals are with prejudice. The Court need only add two words, either "with prejudice" or "without prejudice" to its Orders, but has consistently failed to do so. See Case No. 79-5777, J.S. pp. 1a, 2a, 3a, 4a, 5a, 6a and No. 79-6152, pp. 2a, 3a, 6a, 7a, J.S., and page 1a of this brief.

A review of orders issued in cases filed by other litigants in proper person demonstrates the same pattern of refusal to address or determine the question of the constitutional of NRAP 46(b).

Appellant has met the burden of showing that she timely raised the federal question and that the federal question was

necessary to the decisions in these cases and that there is no adequate, non-federal ground for any of the decisions.

It is not essential that the state court's denial of the federal claim shall have been put in direct terms. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63. The state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point. supra. Chambers v. Mississippi, 410 U.S. 284, 290; Street v. New York, 394 U.S. 576, 582.

The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts. Street, supra, page 583.

It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court, Wolfe v. State of North Carolina, 364 U.S. 186, 80 S.Ct. 1482, 1487.

The failure of the state court to pass upon the federal claim is not conclusive. Wood v. Cheseborough, 228 U.S. 672, 676-680; B & Q R. Co. v. Illinois ex rel Com'rs, 200 U.S. 561. 580-581.

By refusing to rule on the issue, the Nevada Supreme Court has impliedly upheld the constitutionality of NRAP46(b).

As his office does not represent the Justices of the Nevada Supreme Court and they are not parties herein, the Attorney General's guess as to what the Court meant in its decision is no better than Appellant's or that of the proverbial man in the street, for that matter, and should be accorded no more weight.

THE ISSUE IS SUBSTANTIAL AND IMPORTANT

The Attorney General says that the federal question is not substantial. Nevertheless, he has added another deputy

(Struve) to his arsenal. Counting the Attorney General, his three deputies and Robert Petroni, counsel for the Clark County School District, there are five State employed attorneys assigned to cases which the Appellant is pursuing in proper person. Valley Bank has private counsel, John Whelton, in addition.

The issue involved, the constitutionality of NRAP 46(b), would seem to be of great interest only to Appellant and a few other persons similarly situated who seek to appear in proper person before the Nevada Supreme Court, but apparently she underestimates its significance.

The importance of this issue can be gauged by the attention which the Attorney General devotes to it. There are more deputies assigned to these cases than to others which vitally affect the majority of the citizens of Nevada such as Case No. R-78-0077 BRT, U.S. District Court in Reno, State of Nevada v. United States of America, concerning the disposition of 49 million acres of public land held by the Department of the Interior, or Case No. CV-LV-79-174 RDF, Alladin Hotel v. Nevada Gaming Commission, regarding the right of a federal judge to enjoin enforcement of a state gaming commission's orders, or Nevada v. Hall, 99 S.Ct. 1182, or Nevada v. California before this Court.

The State of Nevada is litigating the constitutionality of NRAP 46(b) in five courts--state and federal District Court, Supreme Court of Nevada, Court of Appeals of the Ninth Circuit and the United States Supreme Court--in actions brought by Appellant and others, and will continue to do so until there is a final resolution.

THE RULES PROHIBITING PROPER PERSON APPEARANCES HAVE THE FORCE AND EFFECT OF LAW AND ARE STATUTES.

The letter which Appellant received from the Clerk of this Court stated that the appeal in Hayes v. Board of Trustees, Case No. 79-5777, was dismissed on February 19, 1980 for want of a substantial federal question. The official report, 62 L. Ed 2d 739, says the dismissal was for want of jurisdiction. Appellant

assumes the official report is correct and now addresses the issue of jurisdiction in greater detail. She was under the impression that the dismissal was for want of a substantial federal question when she wrote the Petition for Rehearing in Case No. 79-5777 and responded accordingly.

Pursuant to the appellate authority vested in the Court by Section 4 of Article 6 of the Constitution of the State of Nevada, and the rule-making authority vested in the Court by Nevada Revised Statute 2.120, the Supreme Court of Nevada adopted rules governing appellate practice before the Court. NRS 2.120 is similar to 28 U.S.C. 2072, which grants rule-making authority to the U.S. Supreme Court.

The Nevada Supreme Court appointed a committee composed of members of the State Bar, which recommended that the Federal Rules of Appellate Procedure be adopted as they were particularly harmnonious with the Federal Rules of Civil Procedure which had been adopted earlier. The Court entered an Order adopting such Rules, which were taken almost verbatim from the federal rules.

Appellant has invoked the jurisdiction of this court pursuant to 28 U.S.C. 1257(2) which provides that final judgments of a state court may be reviewed by appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant contends that NRAP 46(b) meets the requirement of being a statute, as it has the force and effect of law.

NRAP 46(b) represents the only significant difference between the federal and Nevada rules of appellate procedure, and there is no explanation as to why this provision was added.

NRAP 46(b) is listed as a statute, Nevada Revised Statutes Volume 2, page 1004, and the historical note specifically states

that "Rules of court adopted for the dispatch of business and the impartial administration of justice have the effect of positive law," Nevada Revised Statutes, Volume 1, page 230.

For purposes of appeal, the term "statute" refers to every enactment, legislative in character, to which the state gives the force of law. Williams v. Bruffy, 96 U.S. 176, 182-183, 24 L. Ed. 716. A "state statute" includes a municipal ordinance, the order of a state administrative agency if it is legislative in nature, Lake Erie & W.R. Co. v. State Public Utilities Comm., 39 S. Ct. 345, 346, 249 U.S. 422, and any other enactment to which the state gives the force of law. Wright, Law of Federal Courts, page 532-533.

These enactments which are considered statutes include a provision of a state constitution, Railway Express Agency v. Virginia, 51 S. Ct. 201, 282 U.S. 440, a municipal ordinance, Erznoznik v. City of Jacksonville, 95 S. Ct. 2268, 422 U.S. 205, a traffic regulation promulgated by a city police commission, Railway Express Agency v. New York, 69 S.Ct. 463, an order of the regents of a state university, Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197, and a court order establishing an integrated bar, Lathrop v. Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 1828-1829.

This Court discussed the issue in Chrysler Corp. v. Brown, 99 S.Ct. 1705 and provided a definition:

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristices and be the product of certain procedural requisites. . . in Morton v. Ruiz, we noted a characteristic inherent in the concept of a 'substantive rule.' We described a substantive--or a 'legislative-type rule,' as one affecting individual rights and obligations.' This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'"

The Court noted another important requirement--rules which have the force and effect of law must be products of a grant of

legislative authority. NRAP 46(b) meets all of these standards: it affects individual rights and the Nevada Rules of Appellate Procedure were promulgated pursuant to legislative and constitutional grant of authority.

Nevada Rule of Appellate Procedure 46(b) is, therefore, a statute within the meaning of 28 U.S.C. 1257(2).

NEVADA RULE OF APPELLATE PROCEDURE 46(b) CREATES A MONOPOLY, RESTRAINT OF TRADE AND PRICE-FIXING SYSTEM

Alternatively, if this Court decides that NRAP 46(b) is not a statute, then the concept of exemption under the Sherman Act, 15 U.S.C.A. 1, as state action would not be applicable.

This Court held in Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, that the sale of legal services is within the Act, and that "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

The State Bar of Nevada and the Nevada Supreme Court have promulgated NRAP 46(b), which apparently operates only to the benefit of members of the bar and the Court. As long as civil litigants are denied the right to represent themselves, even granted that most appellants will not exercise that right, members of the bar can charge whatever the traffic will bear for appellate representation.

There is also a restraint of ideas and suppression of unpopular (with attorneys) causes and some citizens can not obtain an attorney at any price. Litigants facing wealthy or politically influential opponents also have difficulty in hiring an attorney.

If NRAP 46(b) was designed to protect the people of Nevada against "frivolous appeals," it is under-inclusive, as this Rule does nothing to protect against suits brought by litigants represented by attorneys. All appeals are as of right, and any and every case can be appealed, without regard to merit.

There is no record that any attorney was ever disciplined for taking a meritless appeal.

ALLOWING DISMISSAL OF HER APPEAL PURSUANT TO NRAP 46(b) WOULD PENALIZE APPELLANT FOR FILING IN STATE COURT

Appellant brought the action against Gladstone and Iverson in state court on November 20, 1978. Other persons were listed but not named as defendants. Three of the four counts--for libel, interference with a contract and deprivation of civil rights--were dismissed on the basis of privilege and immunity. The subsequent appeal to the Nevada Supreme Court was dismissed, but it is not clear if this is without or with prejudice.

When it became apparent that Appellant could not proceed in state courts due to the implementation of NRAP 46(b), she filed a "back-up" suit in the federal district court in Las Vegas, listing Gladstone, Iverson and others as defendants, on July 9, 1979. No defendants have been served as yet.

If the Nevada Supreme Court's dismissal in this case and in Hayes v. Board of Trustees is considered as being on the merits, it will seriously impair the litigation in the federal court.

If Appellant had filed originally in federal court, she would not have encountered any problems. To uphold the validity of dismissals pursuant to NRAP 46(b) would, in effect, penalize her for pursuing state court remedies first.

There are at least three federal questions which would invoke and support federal jurisdiction:

1. There is a cause of action pursuant to 42 U.S.C. 1983. Gladstone and Iverson were members of a temporary Hearing Commission empaneled under the auspices of the Nevada Department of Education. They were acting under color of state law when theylibelled Appellant in an advisory report submitted to the Board of Trustees of the Clark County School District.

2. The statutory scheme creating such Hearing Commissions

is defective in that it does not provide a due process hearing. The first requirement for due process is a fair tribunal. Members of these commissions are not sworn and there is no challenge for bias. Mervin Iverson was an employee of the Clark County School District and was paid his regular salary by the District during the time he served on the commission, pursuant to NRS 391.3192(6). Iverson was "appointed" by the School District to serve on the commission.

In order to have a hearing, teachers are required to pay one-half of the Hearing Chairman's salary and one-half of the cost of a transcript, if the Chairman requests one be made, pursuant to NRS 391.3192(4), (5).

3. Appellant is seeking a declaratory judgment in the state and federal court actions that NRS. 41.035 and NRS 41.032, which limit and preclude awards of punitive damages in actions brought against state employees or officers, are invalid in that they conflict with the provision of 42 U.S.C. 1983.

The state district court has denied Appellant's motion for said declaratory judgment.

NRAP 46(b) IS VAGUE AND IS ARBITRARILY AND CAPRICIOUSLY APPLIED

Appellant's expected admission to the Nevada Bar might not render the issue of the constitutionality of NRAP 46(b) moot or inapplicable, as the Rule does not say whether an attorney may represent herself.

NRAP 46(b) is arbitrarily and capriciously applied and litigants never know at what point the Nevada Supreme Court will decide to enforce it. In some cases filed by other litigants, clerks of the state district courts have refused to accept a Notice of Appeal filed in proper person or to transmit the record. In some instances, the record is transmitted but the Clerk of the Nevada Supreme Court refuses to docket the appeal. In Hayes v. Board of Trustees, the Court denied leave to appear in proper person at oral argument or to file new briefs, although Appellant notified the court that she had discharged her attorney, Jeffrey

Sobel, seven weeks prior to the scheduled oral argument date. Appellant was allowed to docket the appeals in Hayes v. Gladstone and Hayes v. Valley Bank, but was then barred from proceeding further.

The Justices merely performed an administrative function and did not adjudicate the issue of whether or not Appellant should be allowed to appear in proper person. Their Orders, therefore, are not judicial decisions which would not be subject to review.

CONCLUSION

For the reasons set forth above and those contained in the Jurisdictional Statement and the Jurisdictional Statement, Brief in Opposition to Motion to Dismiss Appeal and Petition for Rehearing filed in Case No. 79-5777, Appellant respectfully requests that this Honorable Court deny Appellees' Motion to Dismiss Appeal.

Appellant prays that this Court reaffirm the precedent established in Boddie v. Connecticut, and declare that the provisions of Nevada Rule of Appellate Procedure are unconstitutional as applied to Appellant and that Orders of the Nevada Supreme Court dismissing appeals pursuant to said Rule are invalid if intended to operate as dismissals with prejudice.

Respectfully submitted,

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Appellant in Proper Person

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Appellant,

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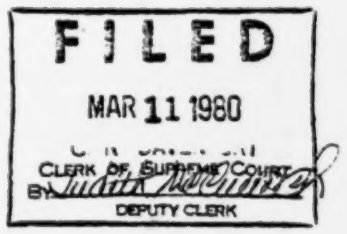

ORDER

After Janice Hayes filed a notice of her appeal to the United States Supreme Court, we granted her motion for a stay of remittitur for 30 days pursuant to NRAP 41(b). Hayes now moves to extend that time. Since she shows no reason why we should so do, and an adequate remedy is provided in 28 U.S.C. § 2101(f), we decline to stay remittitur further.

The order of December 26, 1979, staying the remittitur for a 30-day period should be, and hereby is, vacated. The remittitur shall issue forthwith.

Hayes also asks for a declaratory judgment as to the constitutionality of NRAP 46(b). Since we have already denied a rehearing on our order dismissing appeal, we decline to consider any further matters in this case.

It is so ORDERED.

Mowbray, C. J.

Thompson, J.

Gunderson, J.

Manoukian, J.

Batjer, J.

cc: Hon. Michael J. Wendell, District Judge
Hon. Richard H. Bryan, Attorney General
Harry W. Swainston, Deputy Attorney General
Janice Hayes
Loretta Bowman, Clerk